TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 534.

THE UNITED STATES, APPELLANT,

vs.

LINCOLN C. ANDREWS.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 3, 1914.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 554.

THE UNITED STATES, APPELLANT,

vs.

LINCOLN C. ANDREWS.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

1. I.—*Petition. Filed November 29, 1910.*

In the Court of Claims.

LINCOLN C. ANDREWS
v.
THE UNITED STATES. } No. 30785.

Petition.

(Filed November 29, 1910.)

To the honorable the Court of Claims:

The claimant, Lincoln C. Andrews, respectfully represents:

I. During the time hereinafter mentioned he was a captain in the 15th Cavalry, United States Army, of over fifteen (15) years' service.

II. On August 1, 1907, while enjoying a leave of absence of four (4) months, from July 1, 1907, granted by paragraph 26 of Special Orders, No. 141, War Department, June 17, 1907, claimant received the following telegram from the War Department:

"1 AUG.

"Captain LINCOLN C. ANDREWS,
"Continental Mexican Rubber Company,
"111 Broadway, New York.

"By direction of the President, although your leave is not revoked, your absence from this date will be without pay by order Acting Secretary War.

"MCCAIN, *Adj. Gen.*"

Claimant continued on leave until November 1, 1907, when he reported for duty.

III. For the period from August 1 to October 31, 1907, in-
2 clusive, claimant received no pay whatever. He maintains that he is entitled to half pay as an officer absent with leave, in accordance with Revised Statutes, section 1265. He claims half pay of a captain, mounted, of over fifteen (15) years' service, for such period, amounting to three hundred and twenty-five dollars ($325).

IV. This claim is based on Revised Statutes, sections 1261, 1262, 1265, and on the decision of the Supreme Court of the United States in the case of Glavey v. United States, 182 U. S., 595.

V. This claim has been presented to the Auditor for the War Department and to the Comptroller of the Treasury, and has been disallowed by those officers.

VI. No assignment or transfer of this claim, or of any part thereof or interest therein, has been made; and the claimant is justly entitled to the amount herein claimed from the United States, after allowing

all just credits and offsets. The claimant is a citizen of the United States. And the claimant claims three hundred and twenty-five dollars ($325).

KING & KING,
Attorneys for Claimant.

DISTRICT OF COLUMBIA, *ss:*

Lincoln C. Andrews, being duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

L. C. ANDREWS.

Subscribed and sworn to before me this 28th day of November, 1910.

[SEAL.]

MARIE A. SEARLES,
Notary Public.

3 II.—*Traverse. Filed April 27, 1911.*

In the Court of Claims of the United States. December term, A. D. 1913.

LINCOLN C. ANDREWS
vs. No. 30785.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

HUSTON THOMPSON,
Assistant Attorney General.

4 III.—*History of proceedings.*

On April 27, 1911, this case was argued and submitted to the court.

On December 4, 1911, the court filed findings of fact and conclusion of law and entered a judgment dismissing the claimant's petition.

On March 9, 1912, the claimant made a motion for a new trial.

On February 12, 1914, the claimant's motion for a new trial was argued by Mr. George A. King for the motion. Mr. George M. Anderson was heard in opposition, and the motion was submitted.

On March 16, 1914, the claimant's motion for a new trial was allowed. Former dismissal of petition was vacated and set aside. Court filed findings of fact and conclusion of law and entered judgment for claimant in the sum of $325, with an opinion per curiam as follows:

5 IV.—*Findings of fact and conclusion of law and opinion per curiam. Filed March 16, 1914.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

During the period for which this claim has been made the claimant was a captain in the Fifteenth Regiment of United States Cavalry, with a record of over fifteen years' service.

II.

The claimant having accepted employment with a commercial company, was granted six months' leave of absence, to take effect January 1, 1907, by paragraph 2, Special Orders, No. 305, War Department, dated December 28, 1906, which leave was extended for four months, to take effect July 1, 1907, and to expire October 31, 1907, by paragraph 26, Special Orders, War Department, dated June 17, 1907.

III.

While the claimant was enjoying the extension of his leave of absence, The Adjutant General of the United States Army on July 31, 1907, sent him the following telegram:

"By direction of the President, although your leave is not revoked, your absence from this date will be without pay."

His leave without pay from August 1, 1907, to October 31, 1907, was not requested by the claimant, but he did not file a protest against such action nor relinquish his leave and return to duty.

IV.

The claimant was absent from duty from January 1, 1907, to October 31, 1907. From August 1, 1907, to October 31, 1907, he received no pay. His half pay for said period was $325.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is entitled to judgment of and from the United States in the sum of three hundred and twenty-five dollars ($325).

OPINION.

Per curiam:

This case was reported in 47 C. Cls., 51, wherein the petition was dismissed, and the claimant now makes a motion for a new trial upon the ground of error of law.

The facts are undisputed, and as they briefly appear in the foregoing findings it is unnecessary to restate them here. It is only necessary to say that upon further and more mature consideration of the legal question involved we have come to the conclusion that an error was committed by the court upon the former trial, and that judgment should have been rendered in favor of the claimant. (Glavy v. United States, 187 U. S., 595; Whiting v. United States, 35 C. Cls., 291, 301; Dyer v. United States, 20 C. Cls., 166.)

The claimant's motion for a new trial will be allowed and judgment now entered in his favor in the sum of $325, and it is so ordered.

6 V.—*Judgment of the court.*

At a Court of Claims held in the city of Washington on the 16th day of March, 1914, judgment was ordered to be entered, follows:

The court on due consideration of the premises find for the claimant, and do order, adjudge, and decree that the claimant, Lincoln C. Andrews, do have and recover of and from the United States the sum of three hundred and twenty-five dollars ($325).

BY THE COURT.

7 VI.—*Application for, and allowance of, appeal.*

From the judgment rendered in the above-entitled cause on the 16th day of March, 1914, in favor of the claimant, the defendants, by their Attorney General, on the 9th day of June, 1914, make application for, and give notice of, an appeal to the Supreme Court of the United States.

HUSTON THOMPSON,
Assistant Attorney General.

Filed June 8, 1914.

Ordered: That the above appeal be allowed as prayed for.

BY THE COURT.

JUNE 27, 1914.

8 Court of Claims.

LINCOLN C. ANDREWS
vs.
THE UNITED STATES. } No. 30785.

I, John Randolph, assistant clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the history of proceedings in said cause; of the findings of

fact and conclusion of law and opinion per curiam; of the judgment of the court; of the application of the defendants for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 30th day of June, A. D. 1914.

[SEAL.] JOHN RANDOLPH,
Assistant Clerk Court of Claims.

(Indorsement on cover:) File No. 24298. Court of Claims. Term No. 554. The United States, appellant, vs. Lincoln C. Andrews. Filed July 3d, 1914. File No. 24298.

No. 193.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE UNITED STATES, APPELLANT,

v.

LINCOLN C. ANDREWS.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1916

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE UNITED STATES, APPELLANT,
v.
LINCOLN C. ANDREWS. } No. 193.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment of the Court of Claims in favor of appellee in the sum of $325, for three months' half pay as captain, alleged to have accrued while on leave of absence.

On January 1, 1907 (Finding II, Rec. 3), appellee was granted six months' leave in order that he might accept employment with a commercial company. Upon his request, this leave was afterwards extended for four months from July 1, 1907, to October 31, 1907. On August 1, 1907, after he had served one month of the extension, the Adjutant General of the Army telegraphed appellee as follows:

> By direction of the President, although your leave is not revoked, your absence from this date will be without pay.

Appellee did not report for duty until after the expiration of the remaining three months, for which

he had requested leave of absence, and during that time he made no protest concerning the notice placing him on leave "without pay." He is, and has been, ever since his return from leave in the active service, being now second on the list of captains in the Seventh Cavalry.

Appellee filed a claim for three months' half pay as a captain with the Auditor for the War Department, which was disallowed on August 3, 1910, upon the ground that the "claimant had waived his right of pay for the period claimed." The decision of the auditor was affirmed by the Comptroller of the Treasury on the same ground on November 17, 1910.

The Government maintains that appellee was absent with leave upon condition that he should receive no compensation; that if it should be held that the President exceeded his authority in the order complained of, he was then absent without written orders and therefore on leave without pay, and his case would fall within the provisions of section 1265 of the Revised Statutes, which declares that an officer shall forfeit pay during absence without leave.

Appellee's position is that under sections 1261, 1262, and 1265 of the Revised Statutes, and the decision of this court in *Glavey* v. *United States* (182 U. S. 595) the President did not have the power to issue an order denying him pay while on leave of absence, and therefore, under section 1265 of the Revised Statutes he should have received one-half pay during the last three months of his leave.

ASSIGNMENTS OF ERROR.

The Court of Claims erred:

First. In holding that appellee was on leave with half pay during the period from August 1, 1907, to October 31, 1907.

Second. In rendering judgment against the United States and in favor of appellee in the sum of $325.

BRIEF OF ARGUMENT.

First. The President had the power to make the order complained of, which left appellee upon leave without pay.

Second. If the court should hold that the President exceeded his powers in the order putting appellee upon leave without pay, then appellee was absent without authority and therefore on leave without pay under section 1265 of the Revised Statutes.

Third. Neither the Glavey case nor section 1229 of the Revised Statutes is relevant to the issues here presented.

ARGUMENT.

FIRST.

The President had the power to make the order complained of, which left appellee upon leave without pay.

Appellee claims pay as an officer of the Army absent from duty with leave under the provisions of section 1265, Revised Statutes, which is as follows:

> Officers when absent on account of sickness or wounds, or lawfully absent from duty and waiting orders, shall receive full pay; when

> absent with leave, for other causes, full pay during such absence not exceeding in the aggregate thirty days in one year, and half pay during such absence exceeding thirty days in one year. *When absent without leave, they shall forfeit all pay during such absence, unless the absence is excused as unavoidable.* [Italics ours.]

The question, however, involved in this case is to be decided upon matters entirely outside of the statutes quoted.

The Government maintains, in the words of Judge Barney in the first opinion handed down in this case (47 C. Cls. 53), that—

> The practical effect of the order of August 1, 1907, * * * was to change the previous order granting the claimant leave of absence with incident half pay, which he was then enjoying, so as to give him leave of absence without pay for the remaining period of leave allowed in such previous order.

The order of the President was a purely administrative one, though calling for executive judgment. This court has indicated that in matters of internal administration of the Army for the keeping up of discipline that such matters are within the discretion of the Army officials and are not subject to review by the Federal courts.

In the case of *Reaves* v. *Ainsworth* (219 U. S. 296, 304), the court held:

> To those in the military or naval service of the United States the military law is due

> process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers can not be reviewed or set aside by the courts.

In the recent case of *United States* v. *Cecil D. Ross* (No. 131, October term, 1915), Mr. Justice Hughes, in discussing the subject of departmental judgment in the Army and as to what were the duties of members of the Hospital Corps, said:

> We are asked to overrule this departmental judgment, and to take this service out of the broad description of the statute relating to the duties of members of the Hospital Corps. We find no basis for such action. On the contrary, we can not escape the conclusion that, in view of the provisions of the act of Congress and of the authorized regulations with respect to the conduct of military hospitals, we are not at liberty to say that extra-duty pay has been earned in connection with service therein—where there was no detail on extra duty—unless there is a clear abuse of the necessary official discretion. No such abuse is shown here.

From the foregoing cases the general principle is evolved that in respect to administrative matters in the Army, where it is necessary to exercise judgment or discretion, unless there is a clear abuse and a patent contravention of a statute this court will not interfere. Can there be said to have been any abuse of power in this case? Appellee left the Army for the purpose of embarking in commercial business. If that busi-

ness had been successful, undoubtedly he would have retired from the Army. When his six months' leave had about expired and he desired an extension, he wired the War Department as follows:

THE WESTERN UNION TELEGRAPH COMPANY.

TELEGRAM.

Received at War Department.

9 W S AC. 45 paid via Laredo. 4 ex.

TORREON, MEXICO, *June 16, 1907.*

THE ADJUTANT GENERAL,

War Department, Washington, D. C.

I respectfully request four months' extension present leave of absence with pay to enable me to satisfactorily arrange important business matters here that would be seriously prejudicial by my leaving now. Please wire my expense care Continental Rubber, Torreon, Mexico.

L. C. ANDREWS,
Captain, 15 Cabalo.

1115A.

THE ADJUTANT GENERAL'S OFFICE,
War Department.

Official copy.

The foregoing telegraphic request does not appear in the record, but the Government has inserted it here in order that the ambiguity in the last paragraph of Finding III (Rec. 3) may be cleared up. From that paragraph it might be inferred that the four months' extension, or the last three months of such extension was granted without any request on the part of ap-

pellee, whereas the only thing that was not requested by him was "leave without pay" for the period complained of.

For the first seven months of his leave he was drawing half pay from the Army and presumably drawing pay from the commercial organization with which he was connected. In substance, the President said to him that seven months' absence from official duty was time enough in which to attend to his private business on half pay, and that if he desired more time he would have to remain without pay.

Certainly there could have been nothing inequitable in the action of the President. His order, having changed the status of appellee from that under which he was acting when his leave was extended had the effect of annulling that order, and was, in fact, a new order. Having accepted the same by continuing on leave without pay, and not having made any protest or objection until more than two years afterwards, when he filed his claim with the Auditor for the War Department, it would appear that he had acquiesced.

Moreover, the President's power to put appellee on leave without pay can hardly be questioned; for, although section 1265 of the Revised Statutes, *supra*, does not specifically grant him this power, it does not deny him such power.

In the case of *Shurtleff* v. *United States* (189 U. S. 311–317), the President removed an appraiser of merchandise without giving him notice and opportunity to defend himself. Section 12 of the Customs Adminis-

trative Act of June 10, 1890, declares that such an official may be "removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office." Mr. Justice Peckham, delivering the opinion, said:

> In making removals from office it must be assumed that the President acts with reference to his constitutional duty to take care that the laws are faithfully executed, and we think it would be a mistaken view to hold that the mere specification in the statute of some causes for removal thereby excluded the right of the President to remove for any other reason which he, acting with a due sense of his official responsibility, should think sufficient.

If, when confronted with such a statute as was considered in the Shurtleff case the court held that the President might remove an official for causes other than those set forth therein, is it not fair to contend that when considering a statute respecting the question of an officer's leave he might, in his capacity of Commander in Chief of the Army, issue an order putting appellee on leave without pay, even though that order were not affirmatively comprehended within the terms of the statute?

SECOND.

If the court should hold that the President exceeded his powers in the order putting appellee upon leave without pay, then appellee was absent without authority and therefore on leave without pay under section 1265 of the Revised Statutes.

The Government has heretofore in its brief maintained that the President had the power to make the order complained of; but if it should be held that he exceeded this power then appellee's status would bring him within the terms of that part of section 1265 of the Revised Statutes which says that—

> When absent without leave, they shall forfeit all pay during such absence, unless the absence is excused as unavoidable.

When the President issued the order putting appellee on leave without pay, it was a new and a third order and necessarily in conflict with the second order extending his time, since it changed the conditions. If the third order was unlawful, then appellee was in the position of one absent without orders, and to be absent without orders would be tantamount to being absent without leave, and the statute says that when officers are absent without leave "they shall forfeit all pay."

THIRD.

Neither the Glavey case nor section 1229 of the Revised Statutes is relevant to the issues here presented.

Appellee in the court below based his claim on the doctrine laid down in the case of *Glavey* v. *United States, supra*, and the court on reversing its previous

opinion seems to have rested its decision upon that case. In the Glavey case a local inspector of hulls of steam vessels for the district of New Orleans, La., was appointed special inspector of foreign vessels at the same city, with a salary attached of $2,000, and with the understanding between himself and the Secretary of the Treasury that he would not claim the salary of inspector of foreign vessels. He continued, however, to perform the duties of special inspector and received no salary for that office during the time of his incumbency. He afterwards brought suit for his salary during the time he served as special inspector. This court held that as the compensation was fixed by statute it could not be defeated by a bargain or agreement between the claimant and the Secretary of the Treasury.

There is a marked distinction between the Glavey case and the one at bar. Glavey was neither suspended, removed, nor furloughed. He was on duty during the entire time; while Andrews, the appellee here, was admittedly not on duty.

To have an exact parallel of facts between these cases Glavey should have been furloughed or given leave of absence without pay. This is a very general practice, not only in the Army, but in all the departments of the Government. The Government maintains that if Glavey had been suspended by executive order for the good of the service, or had been furloughed without pay because of the exigencies of the service, the court would have held that such suspension or furlough was legal and that he was

not entitled to the compensation fixed for the office during such period. The President certainly has the right to suspend an officer temporarily where the exigencies or good of the service demand it, or to furlough him for a definite period for the same reason, or to remove him entirely from office.

Ex parte Hennen, 13 Pet. 259.
Blake v. *United States*, 103 U. S. 227, 236.
Mullan v. *United States*, 140 U. S. 240.
Parson v. *United States*, 167 U. S. 324.
Shurtleff v. *United States*, 189 U. S. 317.

The only limitation placed upon him in the case of Army officers is by section 1229 of the Revised Statutes, and in all of the cases examined by the Government the court has never directly said that that part of section 1229 which states that "no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof," should limit the President's executive power; but there is a discernible inference to the contrary in the decisions of this court. Section 1229, Revised Statutes, does not control the present situation. It has nothing to do with the circumstances involved in this case, for the President did not drop appellee from the rolls of the Army or attempt to do so.

In the case of *Hartigan* v. *United States* (196 U. S. 169), this court said:

> The power of the President to dismiss a delinquent cadet we do not understand is ques-

> tioned, except as that power is affected by sections 1229 and 1342. We may, however, refer to *Matter of Hennen* (13 Pet. 230); *Blake* v. *United States* (103 U. S. 227, 236); *Mullan* v. *United States* (140 U. S. 240); *Parson v. United States* (167 U. S. 324); *Shurtleff* v. *United States* (189 U. S. 311).

If the President be not controlled by section 1229 Revised Statutes, then his power to furlough appellee without pay would be the same as though he were a civil employee. In the case of *United States* v. *Murray* (100 U. S. 536–537), a clerk in the Treasury Department was granted leave of absence without pay for five months, during which time he performed no service. Chief Justice Waite, rendering the opinion for this court, said:

> To our minds it is clear the judgment below was wrong. While under the regulations of the department an employee is not entitled to a leave of absence with pay for more than 30 days in any one year, there is nothing to prevent the Secretary from putting him on furlough without pay at any time, if the exigencies of the service require it. He may be dismissed absolutely, and it is difficult to see why if this can be done, he may not be furloughed without pay, which is in effect a partial dismissal.

If the exigencies of the service required at that time that the President should put appellee on leave without pay, then appellee would have stood in much the same position which Murray did, in that he would

have been furloughed without pay, which, in effect, was a "partial dismissal."

The Government reiterates that this order of the President was a regulation for the internal administration of the Army, the maintenance of its discipline, clearly within the discretion of the President, and not subject to review by the courts. It has been the general practice not only in the Army, but in the other departments of the Government, to grant leaves of absence without pay. To hold that this can not be done, and that an officer of the Army or civilian employee could enjoy the privilege granted to him, and then bring suit to recover pay for the period of such leave, would create great inconvenience and confusion in the administration of the internal affairs of the Government.

CONCLUSION.

It is respectfully submitted that the petition in this case should be dismissed.

HUSTON THOMPSON,
Assistant Attorney General.

○

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 193.

THE UNITED STATES, Appellant,

v.

LINCOLN C. ANDREWS.

Appeal from the Court of Claims.

BRIEF FOR APPELLEE.

GEORGE A. KING,
WILLIAM B. KING,
WILLIAM E. HARVEY,
Attorneys for Appellee.

Table of Contents.

Table of Authorities.

Supreme Court of the United States.

October Term, 1915.

THE UNITED STATES, *Appellant*,
v.
LINCOLN C. ANDREWS. } No. 193.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

I. STATEMENT OF THE CASE.

Lincoln C. Andrews, an officer of the Army, filed his petition in the Court of Claims, November 29, 1910, to recover half of the legal pay of a captain, mounted, of over fifteen years' service, as fixed by Revised Statutes, Sections 1261, 1262, during the period from August 1 to October 31, 1907, during which time he was absent with leave.

The claim is based upon the following section of the Revised Statutes (Sec. 1265):

"Officers when absent on account of sickness or wounds, or lawfully absent from duty and waiting orders, shall receive full pay; when absent with leave, for other causes, full pay during such absence not exceeding in the aggregate thirty days in one year, and half-pay during such absence exceeding thirty days in one year. When absent without leave, they shall forfeit all pay during such absence, unless the absence is excused as unavoidable."

The facts were found by the court as follows:

I. During the period for which this claim has been made the claimant was a captain in the Fifteenth Regiment of the United States Cavalry, with a record of over fifteen years' service.

II. The claimant having accepted employment with a commercial company, was granted six months' leave of absence, to take effect January 1, 1907, by paragraph 2, Special Orders, No. 305, War Department, dated December 28, 1906, which leave was extended for four months, to take effect July 1, 1907, and to expire October 31, 1907, by paragraph 26, Special Orders, War Department, dated June 17, 1907.

III. While the claimant was enjoying the extension of his leave of absence, the Adjutant-General of the United States Army on July 31, 1907, sent him the following telegram:

"By direction of the President, although your leave is not revoked, your absence from this date will be without pay."

His leave without pay from August 1, 1907, to October 31, 1907, was not requested by the claimant, but he did not file a protest against such action nor relinquish his leave and return to duty.

IV. The claimant was absent from duty from January 1, 1907, to October 31, 1907. From August 1, 1907, to October 31, 1907, he received no pay. His half pay for said period was $325.

On a first hearing the Court of Claims, December 4, 1911, decided adversely to the claimant, Judge Barney delivering the opinion of the court, with a separate con-

curring opinion by Judge Howry. The case is reported upon that hearing 47 C. Cls. 51.

On a rehearing the court, March 16, 1914, decided in favor of the claimant in a brief opinion (record, p. 4; also reported 49 C. Cls. 391), and entered judgment in his favor for $325.

From this judgment the United States appealed.

II. BRIEF OF ARGUMENT.

Decisions of This Court.

The judgment in the claimant's favor was clearly the only one possible under the provisions of Revised Statutes, Sec. 1265. In *United States* v. *Williamson*, 23 Wall. 411, the court, construing the same statutory provision, said (p. 416):

"It is not in the power of the executive department, or any branch of it, to reduce the pay of an officer of the army. The regulation of the compensation of the officers of the army belongs to the legislative department of the government. Congress has fixed the pay of a captain of infantry at $165 per month. The deduction of one-half of the amount, when absent from duty on leave, is not applicable to the case of Captain Williamson. He is entitled to his full pay as a captain of infantry. The Court of Claims has done right, therefore, in giving its award in his favor for the amount withheld, and its judgment is affirmed."

In *United States* v. *Temple*, 105 U. S. 97, and *United States* v. *Graham*, 110 U. S. 219, the law allowed mileage to officers of the Navy without regard to the locality of the travel. A Navy regulation (110 U. S. 220) provided: "For travelling out of the United States the actual expenses only are allowed." This Navy regulation had long continued departmental practice to support it. Yet it was held that it could not set aside the plain terms of the

statute. If a general Navy regulation prescribed by the President and enforced for many years was void because in conflict with a statute, much more is an order applicable only to a single officer ineffectual to take away his statutory pay.

In *United States* v. *Wilson*, 144 U. S. 24, the court said (pp. 27, 28):

"The President had nothing to do with the salary attached to the office. That had been fixed absolutely by the Postmaster-General, under the express directions of a law of Congress."

In *United States* v. *Shields*, 153 U. S. 88, 91:

"Fees allowed to public officers are matters of strict law, depending upon the very provisions of the statute. They are not open to equitable construction by the courts nor to any discretionary action on the part of the officials."

In *Glavey* v. *United States*, 182 U. S. 595, a supervising local inspector of steam vessels was (p. 600) "hereby appointed to serve in connection with your appointment as local inspector of hulls of steam vessels, as a special inspector of foreign steam vessels, without additional compensation, for the port of New Orleans, La., the appointment to take effect from date of oath."

The claimant entered upon his duty under that appointment without making the slightest objection to its terms. The court said (p. 602):

"As he had no authority to appoint Glavey except in virtue of that act, we can not assume that he proceeded or intended to proceed outside of its provisions. We must take it that he meant just what he plainly and expressly declared, and consequently that he intended, in virtue of the authority given by the act of 1882, to appoint Glavey to the office of special inspector of foreign steam vessels at New Orleans."

And further on (p. 608):

"We are of opinion that as the act of 1882 created a distinct, separate office—special inspector of foreign steam vessels—with a fixed annual salary for the incumbent, to be paid by the Secretary of the Treasury out of any moneys in the Treasury not otherwise appropriated; as the plaintiff was legally appointed by the Secretary a special inspector under and by virtue alone of that act; and as he entered upon the discharge of the duties appertaining to that position, he was entitled to demand the salary attached by Congress to the office in question."

On pp. 608, 609, 610, the following remarks are specially applicable to this case:

"The purpose of Congress, as indicated by the act of 1882, was to compensate the services of a special inspector of foreign steam vessels by an annual salary of a specified amount. It was not competent for the Secretary of the Treasury, having the power of appointment, to defeat that purpose by what was, in effect, a bargain or agreement between him and his appointee that the latter should not demand the compensation fixed by statute. Judge Lacombe, speaking for the Circuit Court of the United States for the Southern District of New York in *Miller* v. *United States*, 103 Fed. Rep. 413, 415, well said:

"'Any bargain whereby, in advance of his appointment to an office with a salary fixed by legislative authority, the appointee attempts to agree with the individual making the appointment that he will waive all salary or accept something less than the statutory sum, is contrary to public policy, and should not be tolerated by the courts. It is to be assumed that Congress fixes the salary with due regard to the work to be performed, and the grade of man that such salary may secure. It would lead to the grossest abuses if a candidate and the executive officer who selects him may combine together so as entirely to exclude from consideration the whole class of men who are willing to take the office on the salary Congress has fixed but will not come for less. And,

if public policy prohibit such a bargain in advance, it would seem that a court should be astute not to give effect to such illegal contract by indirection, as by spelling out a waiver or estoppel.' If it were held otherwise, the result would be that the Heads of Executive Departments could provide in respect of all offices with fixed salaries attached and which they could fill by appointments, that the incumbents should not have the compensation established by Congress, but should perform the service connected with their respective positions for such compensation as the Head of a Department, under all the circumstances, deemed to be fair and adequate. In this way the subject of salaries for public officers would be under the control of the Executive Department of the Government. Public policy forbids the recognition of any such power as belonging to the Head of an Executive Department. The distribution of offices upon such a basis suggests evils in the administration of public affairs which it can not be supposed Congress intended to produce by its legislation. Congress may control the whole subject of salaries for public officers; and when it declared that for the purpose of carrying into effect the provisions of the act of 1882 the Secretary of the Treasury '*shall* appoint officers to be designated as special inspectors of foreign steam vessels, *at a salary of two thousand dollars per annum each*,' it was not for the Secretary to make the required appointments under a stipulation with the appointee that he would take any less salary than that prescribed by Congress. The stipulation that Glavey, who was local inspector, should exercise the functions of his office of special inspector of foreign steam vessels 'without additional compensation' was invalid under the statute prescribing the salary he should receive, was against public policy, and imposed no legal obligation upon him. And the mere failure of the appointee to demand his salary as such officer until after he had ceased to be a local inspector, was not in law a waiver of his right to the compensation fixed by the statute."

This language is as applicable to the present case as to the one in which it was rendered. The claimant was on

leave of absence. The Adjutant-General, without revoking his leave, informed him that by direction of the President, although his leave was not revoked, his absence from that date would be without pay. This was an unwarranted attempt on the part of executive officers of the Government to take into their own hands what Congress had determined—the question of the official compensation of an officer of the United States.

Other Federal Authorities.

In *Goldsborough* v. *United States*, Taney, 80; Fed. Case 5519, the United States Circuit Court for Maryland, speaking through Chief Justice Taney, said, referring to a naval officer, 10 Fed. Cases, 562:

"But, where an act of congress declares that an officer of the government or public agent, shall receive a certain compensation for his services, which is specified in the law, undoubtedly, that compensation can neither be enlarged nor diminished, by any regulation or order of the president, or of a department, unless the power to do so is given by act of congress."

In *Adams* v. *United States*, 20 C. Cls. 115, 117, the court says:

"The appointing power has no control, beyond the limits of the statute, over the compensation, either to increase or diminish it. This has been substantially decided in many cases."

In 15 Opinions, 442, 443, Attorney-General Devens had before him a case in which President Grant had ordered as to an officer of the Marine Corps, "Let him be retired on furlough pay." He advised the Secretary of the Navy (p. 444) that "It is not competent to the President to place these retired officers on a different rate of pay than that which the law has fixed." Also (p. 445) that the

officer "is entitled to receive pay according to the rate established by law for retired officers of the Marine Corps, notwithstanding a different rate of pay was named by the President in retiring him." He concludes (p. 445):

"The compensation of an officer thus retired being fixed by statute, and not left to be determined by the President, in so far as that direction limits the pay of Lieutenant Welles on the retired list, it must be treated as of no effect."

In *Rush* v. *United States*, 35 C. Cls. 223, the Court of Claims held that a written waiver by a letter-carrier of additional compensation for work in excess of eight hours, such as was considered by this court in *United States* v. *Post* and *United States* v. *Gates*, 148 U. S. 124, 134, was ineffectual and void.

In *Ohio National Bank* v. *Hopkins*, 8 App. D. C. 146, it was held, citing many cases, that express agreement by a notary public to accept one-half his legal protest fees was contrary to public policy and void.

In *Willey's case*, 11 Comp. Dec. 570, an officer of the revenue-cutter service was found by a board of investigation to have negligently suffered his vessel to collide with another. Upon the recommendation of the board, the Secretary of the Treasury undertook to punish Captain Willey by placing him on leave of absence on half-pay. The Comptroller held, after an elaborate review of the authorities, that notwithstanding the order of the Secretary, the officer was entitled to the pay of his rank as fixed by statute.

Objections Considered.

It was contended in argument in the court below that the power to suspend from office and pay existed as an incident to the power to dismiss. Such a rule, if it exists, has no application to this case for several reasons:

1. An officer of the Army can not be dismissed by the President. Revised Statutes, Sec. 1229, provides:

"And no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."

2. There was no attempt to dismiss the officer, either permanently or temporarily. His status remained that of an officer absent with leave from active duty. The only attempt to change his status was with reference to his pay. He was not for a moment out of the service. His name was borne on the Army Register and on the official monthly directories of the Army for this whole time.

In *Pursell* v. *United States*, 46 C. Cls. 509, 520, it is held:

"Was the status of the officer while thus absent with leave for his own benefit different from that while 'in quarters, engaged in the public service, in the line of duty'? That he was in service there can be no doubt, and while so absent was subject to court-martial as a means of military discipline."

If the claimant's services had been needed—as in case of sudden outbreak of war,—he could have been recalled to duty, and would have had to return at a moment's notice. The Army Regulations, Art. 64, require an officer's address to be at all times given by him to be kept on record during his leave of absence. Arts. 62 and 65 impose upon officers on leave under certain circumstances the performance of important military duties.

3. Where Congress has expressed its will as to what pay an officer shall receive while on leave of absence, the legislative policy is no more subject to be set aside by executive authority than is the direction of the statute as

to his pay while on active duty. The legislative policy being expressed in the statute, it is plainly without warrant of law for any officer of the Government to undertake to say that an officer, though absent with leave, shall be deprived of all pay.

The Attorney-General, in an opinion construing this same Sec. 1265 of the Revised Statutes, says (27 Opin. 269):

"Again, and more comprehensively, the pay of an officer when on leave is just as much his pay as is that when on active duty; and a statute which says that officers of the same rank and length of service shall receive the same pay necessarily means the same pay whether on leave or on active duty."

No Protest Required or Proper.

It was also objected in the court below that the claimant made no protest against the order of the Adjutant-General, communicated to him as the action of the President. Indeed, it is found that "he did not file a protest against such action" (Finding III, rec. p. 3).

This objection ignores the whole theory of military duty and subordination. The filing of a protest would probably have resulted in an immediate summons before a court-martial for insubordination. Protests are out of place in military life. A contractor with the Government may well be called upon to protest against requirements affecting his rights. Not so with an officer. His duty is to do whatever he is told.

This same point arose in the case of *Glavey*, 182 U. S. 595, from which we have quoted (*ante*, pp. 4–6). The Court of Claims in that case by a bare majority held that the claimant was not entitled to recover and gave this reason for that conclusion (35 C. Cls. 242, 255):

"Had he informed the Secretary that he could not

accept the special service indicated upon the terms placed before him by the Secretary's letter, other means, doubtless, would have been used to obviate the needless expense involved in a regular appointment. But claimant made no protest, gave out no intimation that he expected compensation, led the Secretary to believe that the conditions imposed by the letter assigning him to duty had been accepted, thus misleading his superior officer for a period of several years."

Yet this court overruled that view and held that Glavey was entitled to the salary established by law.

Other Authorities.

It seems unnecessary to encumber this brief with elaborate quotations. The following cases directly support the principle that the compensation of a Government official is by law attached to the office and can not be changed by executive officers: *Converse* v. *United States*, 21 How. 463; *Dyer* v. *United States*, 20 C. Cls. 166; *Geddes* v. *United States*, 38 C. Cls. 428; *Miller* v. *United States*, 103 Fed. Rep. 413. This principle was emphatically reaffirmed in *Sherlock* v. *United States*, 43 C. Cls. 161.

Nor is it any objection to this claim that claimant was not rendering any service to the United States during the period in question. For that very reason, he can, under the act of Congress, receive only half pay. He was available for duty and doubtless would have been ordered to duty if war had broken out or if for any other reason his services had been needed.

But apart from that, an officer is entitled to his salary, not upon any theory of contract or quasi-contract, not because he performs certain work or stays at a certain place, but because he holds the office. In the following cases, for one reason or another, the officer rendered no service whatever; yet because he held the office he was

decided to be entitled to the salary: *United States* v. *Williamson*, 23 Wall. 411; *United States* v. *Wickersham*, 201 U. S. 390; *Allstaedt* v. *United States*, 3 C. Cls. 284; *Ware* v. *United States*, 7 C. Cls. 565; *Sleigh* v. *United States*, 9 C. Cls. 369; *Reinhard* v. *United States*, 10 C. Cls. 282; *Fraser* v. *United States*, 16 C. Cls. 507; *Palmer* v. *United States*, 17 C. Cls. 230; *Lellman* v. *United States*, 37 C. Cls. 128; *Corcoran* v. *United States*, 38 C. Cls. 341; *Steele* v. *United States*, 40 C. Cls. 403; *Stilling* v. *United States*, 41 C. Cls. 61; *Collins* v. *United States*, 45 C. Cls. 63; *Beuhring* v. *United States*, 45 C. Cls. 404. So it has been held by the Court of Appeals of New York, by two different Attorneys-General of the United States, and by two Comptrollers of the Treasury. *People* v. *Board of Police*, 75 N. Y. 38; *Kehn* v. *State*, 93 N. Y. 291; *Fitzimmons* v. *Brooklyn*, 102 N. Y. 536; 13 Ops. Attys.-Gen. 103; 15 Ops. Attys.-Gen. 175; *Willey's* case, 11 Comp. Dec. 570 (*ante*, p. 8); and *Clancy's* case, 20 Comp. Dec. 741.

In the last-named case the decision of the Court of Claims in this very case was cited (pp. 742, 743) and applied with a reference to a large number of additional decisions of this and other courts supporting the same view.

Other decisions of State courts to the effect that there can be no valid waiver of official compensation fixed by statute are: *Montague* v. *Massey*, 76 Va. 307 (question of no protest discussed p. 313); *Purdy* v. *Independence*, 75 Iowa, 356; *Gallaher* v. *Lincoln*, 63 Neb. 339; *Galpin* v. *Chicago*, 109 Northeastern, 713, 716. The last-mentioned is an Illinois decision of June 24, 1915, not yet reported in the Illinois reports. There a candidate for an office with large fees attached to it promised to accept a salary of $10,000 a year in lieu of fees. Being elected he received a salary at that rate as long as he lived. After

his death his legal representatives claimed the fees annexed by statute to the office. The court, allowing their claim, said (p. 616):

"The fees or salary of an officer, having been fixed by law, become an incident to the office, and it is contrary to public policy for candidates to attempt to attain such office by promises made to the electors to perform the duties of the office for any other or different compensation than that fixed by law."

Character of the Order.

We have argued this case without reference to the question whether the order set forth in the findings was that of the President or of some officer of the War Department. In legal effect it makes no difference. It does not appear, however, to have been anything more than a mere routine order. It is signed only by the Adjutant-General of the Army.

It says (rec. p. 3): "By direction of the President, although your leave is not revoked, your absence from this date will be without pay." It has been said, *Northern Pacific Railway Co.* v. *Mitchell*, 208 Fed. 469, 473:

"Although the court will presume that the head of a department acts by direction of the President, in the absence of evidence to the contrary, this presumption does not extend down the line to all civil and military officers of the government of whatever grade."

There are even some acts which are not presumed to be those of the President even when attested by the head of the proper Department. *Runkle* v. *United States*, 122 U. S. 543, 561. The order in question in this case seems to have been—to use the language of the *Runkle* case (p. 561)—"a mere departmental order which might or might not have attracted his personal attention." The President was probably referred to as the contitutional head of the

Army. The order, however, whether that of the Adjutant-General, the Secretary of War, or the President, was ineffectual to set aside the plain mandate of the statute.

Conclusion.

The pay of this officer was fixed by law. That law prescribed what he should receive while on active duty and what he should receive while on leave of absence. Executive authority attempted to set aside the statutory measure of compensation and to substitute its own discretion.

A reversal of the judgment in this case would leave to the discretion of any Secretary of War the creation of a list of officers absent on leave without pay. Such a course would only be following out on a larger scale what was done in the single case of this individual officer. If such a radical change of policy is desirable, it should be made by statute, not by executive order. Section 1265 of the Revised Statutes is an expression of the will of Congress to the contrary. So long as that statute remains in force any such departure from its terms as was attempted in the present case can not prevail.

Officers would have just cause of complaint if statutes regulating compensation were no longer to be the measure of their rights. The plain direction of positive statutes can not be set aside and replaced by a vague rule of supposed equity, to be applied by executive officers to whom no such discretion has been committed.

The judgment of the Court of Claims should be affirmed.

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UNITED STATES *v.* ANDREWS.

APPEAL FROM THE COURT OF CLAIMS.

No. 193. Argued January 21, 24, 1916.—Decided February 21, 1916.

Under Rev. Stat., § 1265, an officer of the army is entitled to half pay while on leave granted by proper authority.

No power has been conferred on the President to grant an army officer leave without pay, or to affix to an order granting leave a condition to that effect.

Whatever power the President may have to dismiss civil officers, it does not apply to officers of the Army and Navy, who, under Rev. Stat., § 1229, shall not in time of peace be dismissed except upon and in pursuance of the sentence of a court-martial or in commutation thereof.

An officer of the army granted, and accepting, leave without pay is not estopped from demanding the half pay allowed by statute, even though he did not protest at the affixing of such a condition to the order granting the leave. *Glavey* v. *United States*, 182 U. S. 595.

Accepting leave with the condition affixed that it be without pay does not amount to absence without leave for which pay cannot be allowed under the statute.

Public policy prohibits any attempt by unauthorized agreement with an officer of the United States, under guise of a condition or otherwise, to deprive him of the right to pay given by statute.

49 Ct. Cl. 707, affirmed.

THE facts, which involve the construction of statutes regulating pay of officers of the Army of the United States while on leave, are stated in the opinion.

Mr. Assistant Attorney General Huston Thompson for the United States:

The President had the power to make the order complained of which left appellee upon leave without pay. *Reaves* v. *Ainsworth*, 219 U. S. 296, 304; *United States* v. *Ross*, 239 U. S. 530.

Claimant having accepted the extension order by continuing on leave without pay, and not having made any protest or objection until more than two years afterwards, acquiesced.

The President's power to put appellee on leave without pay cannot be questioned; for, although § 1265, Rev. Stat., does not specifically grant him this power, it does not deny him such power. *Shurtleff* v. *United States*, 189 U. S. 311, 317.

If the President did exceed his powers in the order putting appellee upon leave without pay, then appellee was absent without authority and therefore on leave without pay under § 1265, Rev. Stat.

Neither *Glavey* v. *United States*, 182 U. S. 595, nor § 1229, Rev. Stat., is relevant to the issues here presented.

The President has the right to suspend an officer temporarily where the exigencies or good of the service demand it, or to furlough him for a definite period for the same reason, or to remove him entirely from office. *Ex parte Hennen*, 13 Pet. 259; *Blake* v. *United States*, 103 U. S. 227, 236; *Mullan* v. *United States*, 140 U. S. 240; *Parson* v. *United States*, 167 U. S. 324; *Shurtleff* v. *United States*, 189 U. S. 317.

Rev. Stat., § 1229, has nothing to do with the circumstances involved in this case, for the President did not drop appellee from the rolls of the Army or attempt to do so. *Hartigan* v. *United States*, 196 U. S. 169.

If the President be not controlled by § 1229, Rev. Stat., then his power to furlough appellee without pay would

be the same as though he were a civil employé. *United States* v. *Murray*, 100 U. S. 536.

The order of the President was a regulation for the internal administration of the Army, the maintenance of its discipline, clearly within his discretion, and not subject to review by the courts. It has been the general practice not only in the Army, but in the other departments of the Government, to grant leaves of absence without pay. To hold that this cannot be done, and that an officer of the Army or civilian employé could enjoy the privilege granted to him, and then bring suit to recover pay for the period of such leave, would create great inconvenience and confusion in the administration of the internal affairs of the Government.

Mr. George A. King, with whom *Mr. William B. King* and *Mr. William E. Harvey* were on the brief, for appellee.

Mr. Chief Justice White delivered the opinion of the court:

The United States appeals from a judgment awarding the appellee $325 found to be due him under Rev. Stat. § 1265 for half pay as a captain of cavalry of fifteen years' service for a period of three months from August 1 to October 31, 1907, during which time it was found he was absent on leave. The court stated the facts as follows:

"The claimant having accepted employment with a commercial company, was granted six months' leave of absence, to take effect January 1, 1907, by paragraph 2, Special Orders, No. 305, War Department, dated December 28, 1906, which leave was extended for four months, to take effect July 1, 1907, and to expire October 31, 1907, by paragraph 26, Special Orders, War Department, dated June 17, 1907.

"While the claimant was enjoying the extension of his leave of absence, The Adjutant General of the United

States Army on July 31, 1907, sent him the following telegram:

"'By direction of the President, although your leave is not revoked, your absence from this date will be without pay.'

"His leave without pay from August 1, 1907, to October 31, 1907, was not requested by the claimant, but he did not file a protest against such action nor relinquish his leave and return to duty.

The claimant was absent from duty from January 1, 1907, to October 31, 1907. From August 1, 1907, to October 31, 1907, he received no pay. His half pay for said period was $325."

It is apparent from the authorities cited in the *per curiam* opinion of the court below (*Glavey* v. *United States*, 182 U. S. 595; *Whiting* v. *United States*, 35 Ct. Cl. 291, 301; *Dyer* v. *United States*, 20 Ct. Cl. 166) that the allowed recovery was based upon the conclusion that the half pay during the leave of absence was expressly sanctioned by law (Rev. Stat., § 1265) and hence any condition conflicting with such statutory right was void and that the officer being entitled to rely upon the statute, no estoppel against him could be implied because of his having acted upon the leave, albeit it contained a condition in conflict with the rights conferred by the statute. To test the merits of these conclusions will dispose of the entire case, since all the contentions of the Government are embraced in three propositions: 1, the asserted existence of authority to grant the leave conditioned on its being without pay notwithstanding the statute; 2, even if such power did not exist the binding effect of the condition upon the officer who accepted the leave which was subject to it; and 3, in any event the impossibility of separating the grant of leave from the condition upon which the leave was based, thus under the hypothesis of illegality rendering the grant void and causing the ab-

sence from duty which was enjoyed under the apparent sanction of the grant to be an absence without leave for which under the statute no right to pay existed. It is manifest that these contentions assume, as did the conclusions of the court below, that the telegram stated in the findings operated to grant a new leave for the three months therein specified subject to the condition that it should be without pay, and in separately testing the propositions we shall treat the telegraphic order as having that significance.

1. As in view of the plain text of Rev. Stat., § 1265, there is no room for disputing that the right to half pay during the period of the leave in question was conferred by the statute, there is and can be no dispute that tested by the statute alone the court below did not err in allowing the claim for such half pay. But the contention is that error was committed because the conferring of the right to pay by the statute was not exclusive and therefore did not deprive of the authority as an incident to the power to grant the leave to affix the condition that the leave should be without pay notwithstanding the statute. It is unnecessary, however, to stop to point out the unsoundness of this proposition, since the error upon which it rests is authoritatively demonstrated by previous decisions which substantially leave the proposition not open for discussion. *United States* v. *Williamson*, 23 Wall. 411, 416; *United States* v. *Wilson*, 144 U. S. 24; *United States* v. *Shields*, 153 U. S. 88, 91; *Glavey* v. *United States*, 182 U. S. 595. Nor in contemplation of the cases which we have just cited and additionally in view of the provision of Rev. Stat., § 1229, that "no officer in the military, or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof," is there any necessity to point out the want of application of the authorities dealing with the power to dismiss civil

officers which are cited as a basis for the proposition that a like power applies to army officers and therefore as there was authority to dismiss, the lesser right of granting the leave without pay necessarily obtained. So also it is unnecessary to enter into any detailed analysis of the decision in *Hartigan* v. *United States*, 196 U. S. 169, since that case concerned the power to remove a cadet at the Military Academy and the recognition of the right to exercise that authority was in express terms based upon the view that although in a sense a part of the army cadets at the Military Academy were not officers within the intendment of Rev. Stat., § 1229, and indeed the opinion in the *Hartigan Case* in substance refutes the extreme contention as to power which is now sought to be sustained.

2. The contention as to the estoppel resulting from the failure to protest against the condition affixed to the leave and the binding force of such condition even if illegal, resulting from an acceptance of the leave containing it, is by necessary implication foreclosed by all the cases previously cited and in fact was in express terms considered and held to be without merit in *Glavey* v. *United States, supra*. Because that case concerned an illegal condition attached to the performance of the duties of an office and this involves an illegal condition attached to a grant of leave affords no ground for distinction between that case and this. The basis of the ruling in the *Glavey Case* was the right of the official to rely upon the provisions of the statute and the resulting want of power to apply a principle of estoppel. And as here there was express statutory authority for the half pay during the leave, the reason in the *Glavey Case* is controlling and the distinction relied upon involves no difference justifying taking this case out of the principle settled in the *Glavey Case*. As the statute conferred the right to the half pay during the leave, it necessarily follows that the exclusion of executive authority over that subject which resulted extended to

and was coterminous with the power which the statute exerted.

3. The contention that even if the condition which was attached to the leave be treated as illegal and the acceptance of the leave containing it be decided not to have operated an estoppel, nevertheless under such circumstances the leave must be treated as void and the absence based on it be held to have been one without leave for which no pay could be allowed under the statute, is self-contradictory and besides in its essence must rest upon the assumption that there was power to affix the condition, the terms of the statute to the contrary notwithstanding. The contention therefore is in substance foreclosed by *Glavey* v. *United States*, *supra*, and the decided cases to which we have previously referred. How completely this is the case will be demonstrated by observing that the decision in the *Glavey Case* was expressly based on the ground that public policy forbade giving any effect whatever to an attempt to deprive by unauthorized agreement made with an official, express or implied, under the guise of a condition or otherwise, of the right to the pay given by the statute. And of course the contention now made that the absence with leave which carried pay under the statute was converted into an absence without leave carrying no pay in consequence of an unauthorized attempt to subject the granted leave to an illegal provision that it should be without pay is absolutely in conflict with the previous cases and the rule of public policy upon which they were based. In fact the contention but in a changed form asserts the application of estoppel which as we have seen was expressly adversely disposed of in the previous cases.

Affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.